14661-1

No. 33236-1-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

TESORO REFINING AND MARKETING COMPANY,

Plaintiff-Appellant

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Defendant-Respondent

ON APPEAL FROM THURSTON COUNTY SUPERIOR COURT
(Hon. Richard D. Hicks)

APPELLANT'S REPLY BRIEF

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I.

INTRODUCTION

The Department's answering brief can be distilled to two points.

First, the Department wants this Court to adopt a reading of the HST law that would hold refinery fuel gas subject to the hazardous substances tax ("HST"). But to do so requires this Court to ignore nearly 20 years of history surrounding the HST law, including the Department's own regulation (WAC 458-20-252(7)(b)), under which refinery gas would not be taxed.

Second, the Department claims Tesoro is seeking an exemption from tax -- an argument plainly intended to obtain the benefit of the rule of construction that exemption statutes are to be strictly and narrowly construed against the taxpayer. In fact, Tesoro is not claiming that a statutory exemption exists for refinery fuel gas, nor is this an exemption case. This is an incidence case, and the question before the Court is whether the HST was intended to be imposed on refinery fuel gas.

As demonstrated in its Opening Brief, Tesoro's position makes sense from the standpoint of both the legislative history of the HST statute and the Department's implementing regulation. While the HST law has gone through two statutory iterations, the Department has kept subsection (7)(b) of the regulation intact throughout. This was evidently

done for the logical and common sense reason that first the Legislature, and then the people through the initiative process, never intended to have the HST apply to byproducts of the manufacturing process that are created and consumed within the manufacturing plant, and which do not pose a danger to human health or the environment.

Tesoro's reading of the statute is at least as reasonable as the Department's. When there are two reasonable interpretations of a tax statute, the benefit of the resulting doubt weighs in the taxpayer's favor in an incidence case. This is such a case, and this Court, therefore, should reverse the trial court, and grant Tesoro's refund petition.

II.

ARGUMENT IN REPLY

A. This Is an Incidence Case, and Tesoro Therefore Is Entitled to Prevail So Long as Its Reading of the HST Is Reasonable.

The controlling rule of construction in this case is the principle that tax-imposing statutes in doubtful cases are to be interpreted in favor of taxpayers. See, e.g., First American Title Insurance Co. v. Dep't of Revenue, 144 Wn.2d 300, 303, 27 P.3d 604 (2001) (citing Duwamish Warehouse Co. v. Hoppe, 102 Wn.2d 249, 254, 684 P.2d 703 (1984)). Not surprisingly, the Department seeks to turn this case into a tax exemption case, in order to avail itself of the rule of construction that the taxpayer has the burden of showing qualification for a tax exemption and if

there is any ambiguity, the exemption must be construed against the taxpayer. See Simpson Investment Co. v. Dep't of Revenue, 141 Wn.2d 139, 149-50, 3 P.3d 741 (2000).

But this is not an exemption case. This is an incidence case, and in incidence cases, the default is in favor of taxpayers, e.g., Duwamish Warehouse Co. v. Hoppe, 102 Wn.2d 249, 254, 684 P.2d 703 (1984); State Dep't of Revenue v. Hoppe, 82 Wn.2d 549, 552, 512 P.2d 1094 (1973), with "any doubt as to the meaning of [the] tax statute . . . construed against the taxing power." First American Title Ins. Co. v. Dep't of Revenue, 144 Wn.2d 300, 303, 27 P.3d 604 (2001) (emphasis added) (citing Duwamish Warehouse Co. v. Hoppe, supra); see Weyerhaeuser Co. v. Dep't of Revenue, 106 Wn.2d 557, 566, 723 P.2d 1141 (1986); Shurgard Mini-Storage of Tumwater v. Dep't of Revenue, 40 Wn. App. 721, 727, 700 P.2d 1176 (1985); MAC Amusement Co. v. Dep't of Revenue, 95 Wn.2d 963, 966, 633 P.2d 68 (1981); see generally 3A Norman J. Singer, Statutes and Statutory Construction § 66.1 (6th ed. 2003). As the United States Supreme Court has stated:

> In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen.

Gould v. Gould, 245 U.S. 151, 152, 38 S. Ct. 53, 62 L. Ed. 211 (1917) (emphasis added) (citations omitted).

B. Tesoro Does Not "Possess" Refinery Gas, Because Tesoro Does Not "Control" That Byproduct of Its Refinery Operations.

The Department argues that Tesoro "possesses" refinery gas, because it "controls" the gas and uses it for fuel. Department's Brief at 7-9. The HST is imposed on the "privilege of possession of hazardous substances in this state." RCW 82.21.030(1) (emphasis added). "Possession" is defined to mean:

> the control of a hazardous substance located within this state and includes both actual and constructive possession. "Actual possession" occurs when the person with control has physical possession. "Constructive possession" occurs when the person with control does not have physical possession.

RCW 82.21.020(3) (emphasis added). Thus, the key to having "possession" of a hazardous substance, and therefore being liable for the HST, is to "control" the substance. In turn, "control" is defined by the statute to mean:

> the power [1] to sell or use a hazardous substance or [2] to authorize the sale or use by another.

RCW 82.21.020(3) (emphasis and bracketed inclusions added).

The concept of "control" -- the power to sell or use, or to authorize the sale or use of the substance by another -- simply is not consistent with the chemical fortuity of the process by which refinery fuel gas is created and consumed without possibility of sale at Tesoro's Anacortes refinery. The

undisputed facts establish that refinery gas is continually yielded from the natural chemical reactions that occur in various refining process units, such as cracking, reforming, and hydrotreating, within Tesoro's Anacortes refinery. (CP 43) (Crawford Decl. ¶ 23). The byproduct of those chemical reactions is refinery gas, which is continuously produced and immediately consumed (burned) in the process heaters and boilers for heat input into the unit processes. (CP 43) (Crawford Decl. ¶ 24). Tesoro has no power or ability to sell the gas or do anything with it other than burn it in the process heaters or in the flare, or vent it into the atmosphere. See (CP 259) (Second Crawford Decl. ¶ 11).

The Department seizes upon the first part of the statutory definition of control to argue that, because Tesoro has the power to use refinery gas as a heat source for the Refinery's process heaters, Tesoro should be deemed to possess the gas -- rendering it taxable under the HST. See Department's Answering Brief at 5. The phrase "power to sell or use a hazardous substance," however, should be read to mean the power either to sell or use a hazardous substance; if the substance can be used but not sold, then it cannot be controlled, and therefore should not be subject to the HST.

Although the word "or" generally is considered to be used disjunctively, the principle is well established that "or" will be deemed to have a conjunctive meaning when the context shows it should be given such

a meaning.[1] Here, the historical context shows that "or" was to be given a conjunctive meaning. The drafters of Department Rule 252, subsection (7)(b), clearly understood the word "or" in the first phrase of RCW 82.21.020(3) to require a conjunctive reading. Because the thrust of the HST -- both the original legislative version and the subsequent and current initiative version -- is to tax final products that "present a threat to human health or the environment" (former RCW 82.22.010; RCW 82.21.010), both the Legislature and the people evidently intended the tax to apply only to hazardous substances that can either be sold or used as final products. Hence, the Department's regulation interpreted the HST law to provide that whenever "any hazardous substance(s) is first produced during and because of any physical combination or chemical reaction which occurs in a manufacturing or processing activity, the intermediate possession of such substance(s) within the manufacturing or processing plant is not considered a taxable possession if the substance . . . is otherwise consumed during the manufacturing or processing activity." WAC 458-20-252(7)(b).

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[1] See Childers v. Childers, 89 Wn.2d 592, 595-96, 575 P.2d 201 (1978) (construing "or" in child support statute); State v. Sigman, 118 Wn.2d 442, 448, 826 P.2d 144 (1992) (construing "or" in criminal statute); Town of Clyde Hill v. Rodriguez, 65 Wn. App. 778, 782, 831 P.2d 149 (construing "or" in DUI statute), rev. denied, 119 Wn.2d 1022, 838 P.2d 692 (1992).

Courts shall interpret statutes "in a manner that best achieves the legislative intent." City of Seattle v. State, 87 Wn. App. 715, 718, 943 P.2d 337 (1997) (citing Clements v. Travelers Indem. Co., 121 Wn.2d 243, 254, 850 P.2d 1298 (1993)). When a substance can only be created and consumed within the process that creates it, it cannot be sold. The Department's regulation followed the logical and common sense implication of this circumstance, when it declared that such substances are not subject to the HST because they do not meet the statutory definition of "control," and therefore do not meet the statutory condition for taxation of "possession." This Court should reject the Department's belated decision to give the structure of the statutory definition of "control" a contrary reading.

C. Neither the Statutory nor the Administrative History of the HST Law Support the Department's Current Interpretation.

The history of the HST law, as well as the Department's promulgation of its interpretative rule, supports Tesoro's reading of the statute. The evolution of the HST, from the Legislature's original version through the people's amendment by initiative, shows no intent to tax transitory manufacturing process substances such as refinery fuel gas. The original law (see Laws of 1987, 3d Ex. Sess., ch. 2, §§ 44-48 & 62), see also (CP 75-77) (Mastrodonato Decl., Exhibit F) contained an intent

section (former RCW 82.22.010) (CP 80),[2] definitions of "possession" and "control" (former RCW 82.22.020(3)) (CP 81), and a tax-imposing provision (former RCW 82.22.030(1)) (CP 81), all of which were identical to the intent (RCW 82.21.010), definitions of "possession" and "control" (RCW 82.21.020(3)), and tax-imposing (RCW 82.21.030(1)) provisions of the current law. The original law also included a section on exemptions, including an exemption for:

> [a]ny possession of (a) alumina, (b) natural gas, (c) petroleum coke, (d) liquid fuel or fuel gas used in petroleum processing, or (e) petroleum products that are exported for use or sale outside this state as fuel.

Former RCW 82.22.040(3) (emphasis added); see (CP 75-77, 79-82) (Mastrodonato Decl., Exhibits F and G).

The Department adopted the first WAC 458-20-252 (Rule 252) following enactment of the HST. See (CP 84-97) (Mastrodonato Decl., Ex. H). As initially adopted, Rule 252 contained two sections material to the present case:

(1) Subsection (4), which restated the statutory exemptions set forth in RCW 82.22.040(3), including the exemption for "liquid fuel or

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[2]The intent section of the Legislature's 1987 HST law stated that the tax was to apply to substances "that the department of ecology determines to present a threat to human health or the environment." Former RCW 82.22.010 (Laws of 1987, 3d Ex. Sess., ch. 2, § 44) (CP 80).

fuel gas used in processing petroleum." Former WAC 458-20-252(4)(c)(ii); see (CP 89) (Mastrodonato Decl., Exhibit H at 5).

(2) Subsection (7), upon which Tesoro relies, as originally adopted, stated:

> When any hazardous substance(s) is first produced during and because of any physical combination or chemical reaction which occurs in a manufacturing or processing activity, the intermediate possession of such substance(s) within the manufacturing or processing plant is not considered a taxable possession if the substance(s) becomes a component or ingredient of the product being manufactured or processed or is otherwise consumed during the manufacturing or processing activity.

Former WAC 458-20-252(7)(b); see (CP 94) (Mastrodonato Decl., Exhibit H at 10) (emphasis added).

When subsections (4)(c)(ii) and (7)(b) are read together, it is apparent that two distinct types of fuels and gases could be used in manufacturing or processing:

(1) Those fuels or gases created outside of the manufacturing or refining process or plant, and which may be added to the manufacturing process; and

(2) Those gases produced within the manufacturing or refining plant, and which either

(a) Became components or ingredients of the final product, or

(b) Were entirely consumed in the manufacturing or refining process.

Both types of products or substances were deemed nontaxable under the first HST regulation. The first type enjoyed a specific exemption from tax. See former RCW 82.22.040(3) and WAC 458-20-252(4)(c)(ii). The second type was not taxable as a matter of incidence. See WAC 458-20-252(7)(b). In the petroleum refining context, this meant that fuels like liquid fuel oil, liquid propane and liquid butane (see (CP 45) (Crawford Decl. ¶ 39)) were exempted from HST under former WAC 458-20-252(4)(c)(ii), while substances like refinery fuel gas were deemed nontaxable as a matter of incidence under former WAC 458-20-252(7)(b), because they were first created and then consumed within the manufacturing or refining plant, and a taxable "possession" therefore had not been established under the statute.

The original HST law was replaced by an initiative approved by the people in 1988. The drafters of I-97 did not change any of the statutory language of the former HST set forth at RCW 82.22.010 (intent section), RCW 82.22.020(3) (definitions of "possession" and "control"), or RCW 82.22.030(1) (imposition of HST). Former RCW 82.22.040(3), exempting "liquid fuel or fuel gas used in petroleum processing," was deleted by the people's initiative. Following the initiative's passage, the

Department amended Rule 252 to conform the regulation to the new HST law. (CP 104-22) (Mastrodonato Decl., Exhibit J). The Department deleted all of subsection (4)(c) of former Rule 252, which included the previous exemption for "liquid fuel or fuel gas used in processing petroleum." Subpart (ii). But the Department retained subsection (7)(b) of Rule 252, thereby maintaining the nontaxability of transitory substances produced in a self-contained, manufacturing process that were consumed within the manufacturing plant. In doing so, the Department evidently made a conscious decision to implement the people's will to treat the two types of products -- (1) liquid fuel or fuel gases brought into the manufacturing process from without, and (2) "intermediate," transitory or ephemeral substances (e.g., refinery fuel gas) produced and consumed within the manufacturing process -- as separate and distinct. The former products (represented by (1)) would now be deemed taxable, but the latter (represented by (2)), including refinery fuel gas, would continue to be nontaxable, because they were not "possessed" in the HST statutory context.

In short, the HST statute was changed by a vote of the people, but the people did not change the definitions of "possession" and "control," nor did they change the incidence or the measure of the tax. The people left these statutory sections alone, presumably because the people did not

seek to change either those portions of the HST, or the Department's interpretation under which internally produced and consumed substances were not subject to the HST, as reflected in Rule 252(7)(b). In turn, the Department followed the people's will and made no changes to Rule 252(7)(b).

"Agency interpretations may be given 'great weight' when the statute is within the agency's special expertise." City of West Richland v. Dep't of Ecology, 124 Wn. App. 683, 690, 103 P.3d 818 (2004) (citing Postema v. Pollution Control Hearings Bd., 142 Wn.2d 68, 77, 11 P.3d 726 (2000)). "Substantial weight is given to an agency's interpretation of the statutes it administers that are within the agency's specialized expertise." Schneider v. Snyder's Foods, Inc., 116 Wn. App. 706, 716, 66 P.3d 640 (2003) (citing Manke Lumber Co. v. Diehl, 91 Wn. App. 793, 802, 959 P.2d 1173 (1998) (citing Weyerhaeuser Co. v. Dep't of Ecology, 86 Wn.2d 310, 315, 545 P.2d 5 (1976))). "An agency's interpretation will be upheld if it is a plausible construction of the statute or rule." Schneider, 116 Wn. App. at 716 (citing Seatoma Convalescent Ctr. v. Dep't of Soc. & Health Servs., 82 Wn. App. 495, 518, 919 P.2d 602 (1996)). Here, the Department, for nearly 20 years and through two statutory iterations, understood the HST not to apply to substances such as the refinery gas produced at Tesoro's Anacortes refinery. This reading of the statute,

entitled to deference under longstanding principles of statutory construction, confirms Tesoro's reading of the HST.

D. "Intermediate" Does Not Have the Limited Hypertechnical Meaning the Department Ascribes to the Word.

The Department argues, as it did before the Superior Court, that intermediate possession can only occur in the chemical reaction, and in one process, and that intermediate possession cannot span processes. Department's Answering Brief at 17 ("Intermediate substances can never be a product or byproduct of the reaction. Rather, an intermediate substance is both created and destroyed in the chemical reaction"). The Department is wrong, and its argument is contrary to its own regulation.

Rule 252 provides that manufacturers must pay HST on hazardous products, but only at the time they are removed from storage for sale, transfer, remanufacture, or consumption:

> Special provision for manufacturers, refiners, and processors. Manufacturers, refiners, and processors who possess hazardous substances are required to report the tax and take any available exemptions and credits only at the time that such hazardous substances are withdrawn from storage for purposes of their sale, transfer, remanufacture, or consumption.

WAC 458-20-252(8)(c) (emphasis added).

Subsection (8)(c) coincides with the intent and purpose of the tax, which is to protect the public and the environment from hazardous substances that have a likelihood of causing harm to human health or the environment. It

tacitly recognizes that intermediate products may be made in various processes, stored, removed from storage, and reintroduced at a later time.

The Department cannot reconcile this provision with the argument that products removed from processes are no longer intermediate. This point is made even more clear when subsections (7)(b) and (7)(b)(i) are examined. Subsection (7)(b) says that the "intermediate possession of such substance(s) within the manufacturing or processing plant is not considered a taxable possession." WAC 458-20-252(7)(b) (emphasis added).[3] It is abundantly clear that the regulation contemplates intermediate substances that survive one process, and which may be

[3]If Rule 252 isn't clear enough on this point, the Department's published Excise Tax Advisory 540.04.22.252 ("ETA 540") should be. See (CP 70-73) (Mastrodonato Decl., Exhibit E) (Tesoro's Brief at 36-38). ETA 540 recognized that "[o]ther products derived from refining crude oil . . . are . . . used as fuel, [and] include . . . Volatile Fuels . . . [such as] Export Refinery Fuel Gas." (CP 71) (ETA 540, p. 2) (emphasis added). It then goes on to state, "These listed 'other products' used as fuel are entitled to the exemptions of hazardous substance tax when used by the refiner in further processing petroleum, i.e., burned in the refinery plant." Id. (emphasis added). The HST clearly doesn't apply to any fuel (refinery fuel gas) used (burned in the refinery plant) in processing petroleum, under the plain and unambiguous language of this departmental bulletin. ETA 540 thus reinforces the notion that subsection (7)(b) of Rule 252 excludes substances created and consumed in a manufacturing process from HST as a matter of incidence. Moreover, ETA 540, like Rule 252, clearly and unequivocally says fuel "used by the refiner in further processing petroleum, i.e., burned in the refinery plant," are not taxable. Id. How much clearer can a departmental publication be about the taxability of a substance? And can it therefore be any surprise that the Department should cancel ETA 540 while this appeal was pending? See Tesoro's Opening Brief, Appendix, Ex. D.

around the plant for a while before remanufacture, blending as a component, or used as a consumer.

The effect is that manufacturers pay HST only on finished products, and those are products that are shipped from the plant, in accordance with Rule 252(8)(c). Refinery gas is not a final product, despite the Department's tortured attempt to make it so. Rule 252 goes on to recognize that when an intermediate hazardous product is shipped from the plant, it may be taxable:

> However, when any intermediate hazardous substance is first produced during a manufacturing or processing activity and is withdrawn for sale or transfer outside of the manufacturing or processing plant, a taxable first possession occurs.

WAC 458-20-252(7)(b)(i) (emphasis added).

Again, subsection (7)(b)(i), like subsection (8)(c), provides that an intermediate substance may be produced and withdrawn from the manufacturing process. This is inconsistent with the Department's argument that a product is only intermediate if it is produced and consumed in the reaction that creates the final product. In fact, a refinery like Tesoro could have any number of intermediate products in storage at the Refinery; for example, blend stocks that survive a process and are waiting to be either reintroduced to another process for further refining or are waiting to be mixed or blended into another product. Subsection (7)(b)(i) allows manufacturers to hold these "intermediate"

products indefinitely unless manufacturers choose to sell or transfer them outside the plant. It is only at the time they leave the plant that they are taxed and no longer considered "intermediate." In short, the concept of "intermediate" cannot salvage the Superior Court's judgment.

E. The Department's Proposed Reading of Subsection (7)(b) Violates the Rule That Tax Laws Should Be Intelligible to Those Expected to Obey Them.

An accountant in the tax department of a manufacturing company attempting to determine whether a substance, otherwise hazardous, that is created and then almost immediately burned (consumed) in the manufacturing process is subject to HST, would turn to subsection (7)(b) of Rule 252. The language of subsection (7)(b) is straightforward and easy to understand. Parsing the elements, the accountant would conclude that refinery gas is an intermediate substance produced as a result of chemical reactions, and that gas does not become a component or ingredient of the final product, but is otherwise consumed during the manufacturing activity. A plain reading of the regulation would lead to the unmistakable conclusion that the HST does not apply to refinery gas.

The Department would have this Court hold this entirely reasonable and sensible reading to be wrong. See Department's Answering Brief at 17-18. Tax laws, however, "should . . . be intelligible to those who are expected to obey them." White v. Aronson, 302 U.S. 16,

20-21, 58 S. Ct. 95, 82 L. Ed. 20 (1937). Accordingly, "[t]ax laws should be construed and interpreted as far as possible so as to be susceptible of easy comprehension and not likely to become pitfalls for the unwary." Board of Assessors of Town of Brookline v. Prudential Ins. Co. of America, 310 Mass. 300, 38 N.E.2d 145, 154 (Mass. 1941). The Department's present reading of its own regulation runs contrary to the vital policies of certainty, consistency, and fair notice that this settled interpretive regulation is designed to serve. Moreover, these policies should be entitled to the greatest weight, given a near 20-year-old contrary interpretation of the HST. "The settled interpretation of a tax statute ought not to be lightly disturbed[,]" for "[s]tability of interpretation is signally desirable in [tax] matters." Commissioner of Revenue v. Oliver, 436 Mass. 467, 765 N.E.2d 742, 748 (Mass. 2002).

> As our state's Supreme Court observed recently:
>
> > DOR is charged with enforcing the tax code and hence has the authority to interpret it. Interpreting statutes is consistent with administering and enforcing the statutes. As one treatise says, . . . "Every legislature wants agencies to determine the meaning of the law they must enforce and to inform the public of their interpretations so that members of the public may follow the law."

Ass'n of Washington Bus. v. Dep't of Revenue, 155 Wn.2d 430, 440, 120 P.3d 46 (2005) (emphasis added) (quoting Arthur Earl Bonfield, State Administrative Rule Making § 6.9.1, at 280 (1986)). Here, the Department has for years advised Washington manufacturers that the HST

did not apply to internally created and consumed hazardous substances. In doing so, the Department adopted a reasonable interpretation of the HST, and the Department should not be allowed to repudiate that reading merely because of the revenue exigencies of the moment.

F. The Department's Call for Invalidation of Its Own Rule, in Order to Preserve Its Victory in This Case, Disregards the Department's Historic Reliance on the Validity of Its Rules and Rule-Making Process.

If the Court does not endorse the Department's present interpretation of its rule, then the Department wants this Court to invalidate that rule: "If Rule 252 conflicts with the HST statutes, the law is controlling. . . . The Department cannot amend the HST statutes through a rule or policy statement." Department's Answering Brief at 26. Yet Rule 252 is an entirely plausible and reasonable interpretation of this intent, and "[a]n agency's interpretation will be upheld if it is a plausible construction of the statute." Schneider v. Snyder's Foods, Inc., 116 Wn. App. 706, 716, 66 P.3d 640 (2003) (citing Seatoma Convalescent Ctr. V. Dep't of Social & Health Servs., 82 Wn. App. 495, 518, 919 P.2d 602 (1996)), previously cited and quoted, supra, at 12. Incredibly, the Department, after who knows how many briefs in which it has argued to the contrary, urges this Court to brush aside the Department's own regulation, and rule against the Department's own, near 20 year history reading of a tax statute. The Department offers no principled reason for

why this Court should so rule, beyond the implicit reason that the result will be a victory over a taxpayer. This Court should decline the invitation to render such a decision.

G. The Board of Tax Appeals' Decision in SHELL OIL Is Not Binding Authority and Is Not Dispositive.

The Department relies on a decision of the State Board of Tax Appeals ("BTA"), Shell Oil Co. v. State, BTA Docket No. 93-28 (1997), to support its argument that refinery gas is subject to HST. See Department's Answering Brief at 21 (and attachment). The BTA's analysis for upholding the HST on refinery gas was based on flawed and incomplete reasoning, and presents no good basis for this Court to hold refinery gas taxable.

Under Rule 252(7)(b), hazardous substances produced as intermediate products in a manufacturing activity are not subject to the HST if either (1) they become "a component or ingredient of the product being manufactured or processed," OR (2) they are "otherwise consumed during the manufacturing or processing activity." In Shell Oil, the BTA applied the exclusion for substances that become components or ingredients of the product being manufactured, ruling that refinery gas did not become an ingredient or component of another product. Thus, the BTA's decision in Shell Oil relies on the first of two applications that make the HST inapplicable to internally produced, intermediate

substances. Tesoro, however, relies upon the second application of the regulation concerning products "otherwise consumed during the manufacturing or processing activity[.]" If the BTA had applied this provision, it would have come to a different conclusion. The BTA thus never addressed the part of the regulation relied upon by Tesoro, so the Shell Oil case cannot fairly be read to support the imposition of HST on refinery gas in this case.

This Court is not bound to follow the mistaken legal applications of an administrative board. St. Martin's College v. Dep't of Revenue, 68 Wn. App. 12, 15, 841 P.2d 803 (1992). In St. Martin's, the college appealed the BTA's determination that a portion of the school's property was not entitled to a property tax exemption. The Superior Court reversed the BTA, concluding it committed an error of law by placing more emphasis on the intensity of St. Martin's use of the property than was required under the applicable law. Id. at 14. Following its own de novo review of the BTA's decision, this Court affirmed the Superior Court and set forth the standard of when deference to an administrative body is justified:

> Deference is generally given to an agency's view of the law in construing ambiguous statutes within the agency's area of expertise; absent such ambiguity, this court is entitled to substitute its judgment on legal issues for those of the administrative tribunal.

Id. at 16.

This Court also explained that, notwithstanding the question of ambiguity, there is no need for a reviewing court to defer to an agency if its decision is unexplained:

> [I]n certain instances a court should grant some deference to an agency's determination as to the meaning of the law, particularly where the language of a statute or regulation is ambiguous. Here, even assuming ambiguity, we are not inclined to defer to the [BTA] on what the parties concede is a legal determination, because the [BTA] has not given any reasons, nor has it set forth any standards, which help us understand why it concluded that a portion of the St. Martin's College is exempt and another portion is not.

Id. at 17.

Likewise here, there is no basis for this Court to adopt the conclusions of the BTA in the Shell Oil case. First, the interpretation of statutes is the province of the judiciary. E.g., Lacey Nursing Center, Inc. v. Dep't of Revenue, 128 Wn.2d 40, 53, 905 P.2d 338 (1995). Second, like the BTA's decision in St. Martin's, the Shell Oil decision contains no explanation or analysis of why the BTA made its determination. And to the extent that it did explain, the BTA relied on the alternative "component or ingredient" part of Rule 252(7)(b) to impose HST on refinery gas, which is the irrelevant part of the statute under the facts and circumstances of this case. Accordingly, the Shell Oil decision can provide no useful guidance to this Court.

III.

CONCLUSION

This Court should reverse the Superior Court. Tesoro has advanced a reasonable interpretation of the HST. In a tax incidence case such as this, any doubt is to be construed against the taxing power and in favor of the taxpayer, and Tesoro's reasonable interpretation of the HST compels rejection of the Department's claims, and granting Tesoro's refund.

RESPECTFULLY SUBMITTED this 6th day of March, 2006.

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I, Kathryn Savaria, the undersigned, hereby certify and declare under penalty of perjury as follows:

I am a citizen of the United States and a resident of Snohomish County, Washington. I am over the age of 18 years and am not a party to the within cause. My business mailing address is 1420 Fifth Avenue, Suite 4100, Seattle, Washington 98101-2338.

I have caused true and correct copies of Appellant's Reply Brief to be served upon the following counsel in the manner described below:

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DATED this 6th day of March, 2006, at Seattle, Washington.

Kathryn Savaria

Kathryn Savaria

No. 79661-1

SUPREME COURT
OF THE STATE OF WASHINGTON

TESORO REFINING AND MARKETING COMPANY,

Plaintiff-Petitioner

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Defendant-Respondent

ON PETITION FOR REVIEW FROM
COURT OF APPEALS, DIVISION II

AMICUS CURIAE MEMORANDUM OF WESTERN STATES PETROLEUM ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW

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